

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KERRI L. DUNNING
Claimant

VS.

WAL-MART
Respondent

AND

AMERICAN HOME ASSURANCE COMPANY
Insurance Carrier

)
)
)
)
)
)
)
)
)
)

Docket No. 1,012,817

ORDER

Respondent and its insurance carrier appealed the January 27, 2004, Order for Compensation entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

In her application for hearing, claimant alleges that she injured her back while pulling pallets and stocking shelves from January 25, 2003, and each working day afterwards.

In the January 27, 2004, Order for Compensation (Order), Judge Fuller granted claimant's request for preliminary hearing benefits.

Respondent and its insurance carrier contend Judge Fuller erred. They argue claimant failed to prove her back injury was caused by an accident at work. They also argue claimant failed to prove respondent received timely notice of her alleged accidental injury. Consequently, respondent and its insurance carrier request the Board to deny claimant's request for benefits.

Conversely, claimant contends the Order should be affirmed. Claimant argues she experienced increasing back pain, which she initially attributed to kidney problems, commencing the latter part of January 2003 and progressing through her last day of working for respondent on February 26, 2003. Claimant also argues she gave respondent notice of her back injury on March 26, 2003, when she first discovered her back pain was from a herniated disk caused by her work. Moreover, claimant contends such notice was

timely as the 10-day period for providing notice was extended to 75 days due to her lack of knowledge of the cause of her symptoms.

The only issues before the Board on this appeal are:

1. Did claimant injure her back as a result of the work she performed for respondent?
2. If so, did claimant give respondent timely notice of the accident or injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

Claimant testified that in late January 2003 she felt a pulling sensation and tightness in her back while moving a heavy pallet with a pallet jack while unloading a truck for respondent. The next morning, claimant awoke in pain. Thinking the pain emanated from a kidney infection, claimant did not immediately seek medical treatment. Claimant continued to work for respondent through either February 26 or 27, 2003, when she could no longer tolerate the progressively worsening pain.

In late February 2003, claimant consulted her personal doctor who ruled out a kidney infection and tested claimant for colon problems. When the colon tested negative, the doctor sent claimant for an MRI.

In mid-March 2003, claimant underwent the MRI. On approximately March 26, 2003, claimant received the MRI results, which showed a herniated disk. After receiving the MRI results, claimant immediately spoke with her department manager, Shirley Terrill, about needing to take off work for surgery for a herniated disk. At that time, claimant also told Ms. Terrill the doctors believed the herniated disk was caused from pulling pallets. Claimant testified, in part:

I informed her [Ms. Terrill] that I had a herniated disk. That I [*sic*] it had been a pallet that I pulled and I had to be off work for awhile [*sic*]. She wanted to make sure that I still had a job when I came back.¹

Ms. Terrill's testimony supports claimant's rendition of the pertinent events as the department manager testified she recalled claimant complaining about her back, which claimant associated with a kidney infection. Ms. Terrill also testified she did not know claimant was attributing her back problems to her work until after the MRI when claimant

¹ P.H. Trans. at 11.

reported she had a herniated disk, which the doctors linked to moving pallets. Ms. Terrill's testimony establishes that this conversation took place sometime in March 2003.

At this juncture of the claim, the Board finds no reason to disturb the January 27, 2004, Order. Accordingly, the Order should be affirmed.

First, the Board affirms the Judge's implied finding that claimant sustained personal injury by accident arising out of and in the course of employment with respondent.

Second, the Board affirms the Judge's implied finding that claimant provided respondent with timely notice of the accident. The Workers Compensation Act provides that the period for providing an employer notice of an accident or injury is extended to 75 days when there is "just cause" for failing to provide that notice within 10 days of the accident.² And these facts establish "just cause." Whether the evidence later establishes that claimant sustained a single accident on or about January 25, 2003, or that claimant sustained a series of repetitive micro-traumas through her last day of work on or about February 26, 2003, claimant provided notice of a back injury from moving pallets within 75 days of whichever accident date is appropriate.

WHEREFORE, the Board affirms the January 27, 2004, Order for Compensation.

IT IS SO ORDERED.

Dated this ____ day of March 2004.

BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² See K.S.A. 44-520.